(6)

No. 91-1231

Supreme Court, U.S.
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In The

# Supreme Court of the United States

October Term, 1992

UNITED STATES OF AMERICA,

*Petitioner,*

v.

ALVIN J. DIXON,

*Respondent.*

UNITED STATES OF AMERICA,

*Petitioner,*

v.

MICHAEL FOSTER,

*Respondent.*

**On Writ Of Certiorari**
**To The District Of Columbia Court Of Appeals**

## BRIEF FOR RESPONDENTS

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## QUESTION PRESENTED

Whether the prosecution of respondents for criminal contempt, based on violations of the criminal code, followed by prosecution for the same criminal code offenses violates the Double Jeopardy Clause.

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**On Writ Of Certiorari**
**To The District Of Columbia Court Of Appeals**

## BRIEF FOR RESPONDENTS

## CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution provides: "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb." The pertinent District of Columbia statutes and rules are reprinted in an appendix to this brief.

## STATEMENT

The two respondents in this case were prosecuted for criminal contempt in the Superior Court of the District of Columbia. At each trial, the prosecutor attempted to prove the respondent violated a court order that required him to refrain from committing acts prohibited by the District of Columbia criminal code. The judgments of conviction sentenced each respondent to prison. This case is before the Court, because the government seeks to prosecute the respondents again, this time on indictments charging the same crimes, based on the identical acts, the prosecutor was required to prove in the contempt proceedings. The court of appeals dismissed the indictments, concluding that further prosecution puts respondents in jeopardy twice for the same offense, in violation of the Double Jeopardy Clause. Pet. App. 1a-20a.

1. *Dixon*. On March 9, 1987, Dixon was charged with second degree murder. A hearing commissioner released him, pursuant to D.C. Code Ann. § 23-1321(a) (1989 Repl.), on a surety bond subject to certain conditions, including the requirement that Dixon "[r]efrain from committing any criminal offense. . . ." Pet. App. 26a; J.A. 8. On February 23, 1988, the United States Attorney filed a Motion To Modify Bond, representing that Dixon had been indicted for possessing cocaine with the intent to distribute it on January 15, 1988. J.A. 10; *see* D.C. Code Ann. § 33-541(a)(1) (1988 Repl.). The Superior Court issued an order, noting that Dixon's indictment (J.A. 9) reflected an apparent violation of the pretrial release condition, and requiring Dixon to show cause why he should not be held in contempt of court or have the conditions of his pretrial release modified. J.A. 12-13.



At the show cause hearing, the Assistant United States Attorney reminded the court "that we are here on the Government's motion filed on February 23, 1988." *Dixon* Supp. R. No. 2 (hereafter "*Dixon* S.R.") at 2. That motion had not mentioned contempt, *see* J.A. 12-13, and the judge did not suggest he intended to pursue a contempt charge. *Dixon* S.R. at 2. As the testimony began, it was clear the court assumed it was conducting a motion to modify bond. After the prosecutor asked his first witness a few questions, the judge wondered if the government had "sufficient evidence to grant the relief that's being requested." *Dixon* S.R. at 8. He explained that proving Dixon committed a new offense did not demonstrate "a risk of flight that would justify my raising the bond. . . ." Because the government was not "asking for preventive detention," under D.C. Code Ann. § 23-1329 (1989 Repl.), the court concluded it could grant the government relief only by holding Dixon "in contempt." The judge asked the prosecutor if he could "establish that [Dixon] committed a new offense beyond a reasonable doubt. . . ." *Dixon* S.R. at 8-9.

The prosecutor believed himself prepared, *Dixon* S.R. at 9, but he apparently did not understand that going forward meant conducting a criminal trial. During the second day of trial, the prosecutor urged the court to overlook a gap in the government's evidence demonstrating the chain of custody of the drugs seized from Dixon, because "for a contempt citation, it's not beyond a reasonable doubt. The standard is less than beyond a reasonable doubt, as we understand it." *Dixon* S.R. at 23. The court allowed the government a continuance to supplement its proof, *Dixon* S.R. at 27, after agreeing with

defense counsel "that this is a criminal trial and that the standard of proof is guilt beyond a reasonable doubt." *Dixon* S.R. at 24. On the third day of trial, four police officers testified for the government. The defense cross-examined all witnesses and introduced evidence. J.A. 10a.

The court's finding showed that the gist of the contempt prosecution was proof of the criminal code offense: "I think it merely is a technicality that [I] take judicial notice of [the release order]. I think the Government's burden is to show that there was in fact a crime committed by the defendant while he was on pretrial release." J.A. 14. The court found "the Government has established, beyond a reasonable doubt, that the defendant was in possession of drugs and that those drugs were possessed with the intent to distribute them." J.A. 14. Dixon was sentenced to 180 days in prison, pursuant to D.C. Code Ann. § 23-1329(c) (1989 Repl.). J.A. 16.

On May 17, 1988, Dixon filed a motion to dismiss the indictment charging possession with intent to distribute cocaine on January 15, 1988. Pet. App. 28a. The Superior Court held that the Double Jeopardy Clause requires dismissal of the indictment. Pet. App. 32a. The government then appealed the dismissal order. Pet. App. 4a.

2. *Foster*. On July 29, 1987, Foster's wife, Ana, filed a petition in the Superior Court for a civil protection order (CPO) directed to her husband. Pet. App. 22a. *See* D.C. Code Ann. § 16-1003(a) (1989 Repl.). Foster consented on August 12, 1987, to entry of a CPO, under D.C. Code Ann. § 16-1005(c) (1989 Repl.), directing him not to "molest, assault, or in any manner threaten or physically abuse" his wife for 12 months. Pet. App. 4a; J.A. 18. In



September and November, 1987, and May, 1988, Ana Foster filed motions to adjudicate Foster in contempt, *see* D.C. Code Ann. § 16-1005(f) (1989 Repl.); D.C. Super. Ct. Intrafamily R. 7(c), for sixteen alleged violations of the CPO. Pet. App. 4a-5a; J.A. 18-29. The last motion included an allegation that Foster assaulted his wife on May 21, 1988. Pet. App. 5a. The United States Attorney filed a complaint on July 21, 1988, charging Foster with assault with intent to kill while armed based on this incident. Pet. App. 7a. Foster was arrested and then detained, July 21, 1988, on a $20,000 surety bond. J.A. 1; *Foster* Supp. R. No. 1 (hereafter "*Foster* S.R.") at 405.

Foster's contempt trial began August 8, 1988. Mrs. Foster's attorney appeared to prosecute. *Foster* S.R. at 3. The Superior Court judge (not the judge who issued the CPO) sought assurance that the lawyers had considered a "settlement" – a matter that did not "make a bit of difference" to the judge. *Foster* S.R. at 6. Moments later, the judge questioned whether Mrs. Foster's attorney was asking him "[t]o just try something for exercise [which] isn't the best way to use the Court's time." *Foster* S.R. at 8. He believed that if Foster had done something as serious as Ana Foster's attorney was suggesting, "the U.S. Attorney's office would be doing something about it." *Foster* S.R. at 8. Foster's attorney then told the judge that the matter was before the grand jury. J.A. 30. Mrs. Foster's attorney added that she had spoken with the United States Attorney's office. She explained, "[S]ome of the witnesses we had subpoenaed will probably not be called for that reason [the grand jury investigation], because the U.S. Attorney has asked us not to call the

officers unless we really need them." J.A. 30. This statement was consistent with petitioner's representation to the Court of Appeals that "the government [does not] seek any role in the contempt proceeding as it is a civil matter," and that generally contempt proceedings for CPO violations should not "be stayed pending criminal charges." United States C.A. Br. 20 nn. 31 & 32. During a three-day bench trial, Mrs. Foster's attorney called eight witnesses including a police officer and introduced various exhibits. Foster testified and denied the charges. Pet. App. 5a-6a.

The court held that to prove Foster committed assaults and threats in violation of the CPO, Mrs. Foster's attorney had "to prove as an element, first that there was a Civil Protection Order, and then . . . the assault [or threat] as defined by the criminal code, in fact occurred." *Foster* S.R. at 367. The court found "beyond a reasonable doubt" that Foster assaulted his wife on November 6, 1987 and May 21, 1988, and threatened her on September 17, 1988. J.A. 39. Foster was acquitted of all other counts, including alleged threats to his wife on November 12, 1987, March 26, 1988, and May 17, 1988. Pet. App. 6a-7a. The court sentenced Foster to an aggregate sentence of 600 days imprisonment – consecutive terms of 150 days imprisonment on each of the three counts, J.A. 42, and on one count related to violation of a CPO obtained by Foster's mother-in-law. Pet. App. 2a.

On January 9, 1989, the grand jury indicted Foster on five counts. Pet. App. 7a; J.A. 43-44. Each count charged the assaultive or threatening conduct for which Foster had either been convicted or acquitted during his first trial. Count 1 alleged an assault on November 6, 1987



(previously convicted), in violation of D.C. Code Ann. § 22-504 (1989 Repl.). Count 2 alleged a threat on November 12, 1987 (previously acquitted). Count 3 alleged a threat on March 26, 1988 (previously acquitted). Count 4 alleged a threat on May 17, 1988 (previously acquitted). Counts 2, 3 and 4 alleged violations of D.C. Code Ann. § 22-2307 (1989 Repl.). Count 5 alleged an assault with intent to kill Ana Foster on May 21, 1988 (previously convicted), in violation of D.C. Code Ann. § 22-501 (1989 Repl.).

Foster moved to dismiss the entire indictment on the grounds that it put him twice in jeopardy for the same offense. He moved to dismiss the threat counts on the additional grounds that his prior acquittals collaterally estopped further prosecution. The Superior Court denied his motion, without addressing his collateral estoppel claim. Pet. App. 8a-9a. Foster took an interlocutory appeal of the denial of his motion to dismiss. Pet. App. 3a.

3. After briefing and argument before separate panels, the District of Columbia Court of Appeals consolidated the cases for reargument *en banc*. The full court unanimously held, on the basis of *Grady v. Corbin*, 495 U.S. 508 (1990), that the Double Jeopardy Clause barred successive prosecution of both Dixon and Foster. Pet. App. 2a-20a. The court found it "obvious," even "undisputed," that both prosecutions concerned "the very same conduct." Pet. App. 15a-16a. The court also found the fact that Mrs. Foster's attorney conducted Foster's contempt trial "irrelevant to the double jeopardy issue," because the prosecutor's identity does not affect "the impact of a contempt prosecution" on the defendant. Pet. App. 19a.

## SUMMARY OF ARGUMENT

A. The fundamental principle that has animated this Court's contempt jurisprudence over the last century is the rule of necessity. Encroachments on fundamental protections afforded other criminal defendants in the name of the special interest served by contempt, vindication of the court's authority, have been allowed only to the extent that the encroachment is genuinely *necessary* to the vindication of that interest. Petitioner's argument that the double jeopardy guarantee should not apply to successive prosecutions for criminal contempt and a criminal code offense ignores that fundamental principle of necessity, as well as the radical changes wrought by increasingly strict application of that principle, from *In re Debs*, 158 U.S. 564 (1895), to *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787 (1987).

The rationale of *Bloom v. Illinois*, 391 U.S. 194 (1968), rejecting the "necessity" perceived in *In re Debs* for denying a jury trial in a serious contempt prosecution, compels the same result here. The protection against being placed twice in jeopardy for the same offense is a fundamental protection of the Bill of Rights. Petitioner has not and cannot advance any necessity for denying the protections of the Double Jeopardy Clause to successive prosecutions for criminal contempt and a criminal code offense.

Contrary to petitioner's suggestion, this Court has never held that successive prosecutions for contempt and a criminal code offense are not barred by the Double Jeopardy Clause. Indeed, the only two decisions of this Court on the issue suggest strongly that double jeopardy



principles apply fully in this context. The only two recent federal court decisions agree. The cases cited by petitioner turn either on double jeopardy issues that have nothing to do with contempt or are based on claims of necessity that have been rejected by this Court.

B. Once it is clear that normal double jeopardy principles apply here, there can be little doubt that respondents were prosecuted twice for the same offense. The offenses charged at the contempt trials were defined as the criminal code offenses plus knowledge of a court order not to commit the criminal code offense. The criminal code offenses thus were every bit as much a "component offense" and a "species of lesser included offense" of the contempt offense as were the offenses in *Harris v. Oklahoma*, 433 U.S. 682 (1977), and *Illinois v. Vitale*, 447 U.S. 410 (1980).

This Court should reject petitioner's invitation to overrule *Grady v. Corbin*, 495 U.S. 508 (1990). *Grady* relies on solid precedent in concluding that in successive prosecutions, the Double Jeopardy Clause requires more than adherence to legislative intent and thus more than the test for legislative intent set out in *Blockburger v. United States*, 284 U.S. 299 (1932). The test articulated in *Grady* for determining whether two offenses are the same in successive prosecutions is a useful test, particularly in this context which, like *Grady*, involves a single course of conduct, limited both as to time and place. Even if this Court were troubled by the potential application of *Grady*'s test in more complicated factual situations, this case is not an appropriate one to address those concerns. Under any test but the most formalistic application of

*Blockburger*, it is clear that respondents were prosecuted twice for the same offense.

## ARGUMENT

### PROSECUTION OF RESPONDENTS FOR CRIMINAL CONTEMPT, BASED ON VIOLATIONS OF THE CRIMINAL CODE, FOLLOWED BY PROSECUTION FOR THE SAME CRIMINAL CODE OFFENSES VIOLATES THE DOUBLE JEOPARDY CLAUSE

#### A. The Constitution Requires Application Of Normal Double Jeopardy Principles To Successive Prosecutions For Criminal Contempt And Criminal Code Offenses

1. The history of this Court's decisions on the power to punish for contempt of court shows an increasing intolerance towards encroachments on constitutional rights in the name of vindicating judicial authority. In 19th Century contempt jurisprudence, there were few limits on the ability of courts to punish summarily without the protections constitutionally guaranteed in criminal prosecutions. This Court repeatedly held, for instance, that federal and state courts could punish any criminal contempt without a jury trial. *E.g.*, *Eilenbecker v. District Court of Plymouth County*, 134 U.S. 31, 36-39 (1890); *In re Debs*, 158 U.S. 564, 594-596 (1895). *See Bloom v. Illinois*, 391 U.S. 194, 195-196 (1968) (discussing history of contempt). As the Court in *Bloom* recognized, "it seems to have been thought that summary power was necessary to preserve the dignity, independence, and the effectiveness of the judicial process – 'To submit the question of disobedience to another tribunal, be it a jury or an other



court, would operate to deprive the proceeding of half its efficiency.'" *Id.* at 208 (quoting *Debs*, 158 U.S. at 595).

Within a few years of its decision in *Debs*, however, the Court became more "sensitive to the potential for abuse which resides in the summary power to punish for contempt." *Id.* at 204. Before the end of the century, the Court began to draw a careful distinction "between contempts occurring within the view of the court, for which a hearing and formal presentation of evidence were dispensed with, and all other contempts where more normal adversary procedures were required." *Ibid* (citing *Ex parte Terry*, 128 U.S. 289 (1888) and *In re Savin*, 131 U.S. 267 (1889)). The distinction was based on a principle of "necessity": "the danger that unless such an open threat to the orderly procedure of the court and such a flagrant defiance of the person and presence of the judge before the public in the 'very hallowed place of justice,' . . . is not instantly suppressed and punished, demoralization of the court's authority will follow." *Cooke v. United States*, 267 U.S. 517, 536 (1925). *See Ex parte Terry*, 128 U.S. at 313 (summary punishment of in-court contempt "absolutely essential"); *Offut v. United States*, 348 U.S. 11, 14 (1954) ("necessities" justify summary power).

During the 20th Century, the Court has approached claims of "necessity" with increasing skepticism and has expanded the protections applicable in contempt cases. *See Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 444 (1911) (defendants in contempt proceedings involving out-of-court behavior must be presumed innocent, proved guilty beyond a reasonable doubt, and accorded the right to refuse to testify against themselves); *Cooke*, 267 U.S. at 537 (alleged contemnors must be advised of

charges, given a reasonable opportunity to meet them, and allowed the assistance of counsel and the right to call witnesses); *In re Oliver*, 333 U.S. 257, 278 (1948) ("right to be heard in open court . . . too valuable to be whittled away under the guise of 'demoralization of the court's authority' "); *Offut*, 348 U.S. at 18 (right to trial before unbiased judge). Thus, by the time *Bloom* was decided, the Court concluded that, for purposes of applying constitutional safeguards in criminal prosecutions, non-summary criminal contempt generally must be regarded as a "crime in the ordinary sense. . . . " 391 U.S. at 201.

The Court's decision in *Bloom* to overrule *Debs* resolved a long struggle over the extent to which the vindication of judicial authority can justify the denial of the constitutional right to a jury. Fifty years earlier, Justice Holmes, who favored "the sharpest and most summary enforcement of order in court and obedience to decrees," had not persuaded the Court that "when there is no need for immediate action contempts are like any other breach of law and should be dealt with as the law deals with other illegal acts." *Toledo Newspaper Co. v. United States*, 247 U.S. 402, 425-426 (1918) (dissenting opinion), *overruled by Nye v. United States*, 313 U.S. 33, 52 (1941). *See United States v. Barnett*, 376 U.S. 681, 755 n.40 (1964) (Goldberg, J., dissenting) (quoting Justice Holmes' dissent). *Cf. Gompers v. Bucks Stove & Range Co.*, 221 U.S. at 442 ("disobedience is a thing accomplished"). Only ten years before *Bloom*, Justice Black decried how the Court still allowed the "boundless expedients of a judicial decree" to "easily evade[]" the "great procedural safeguards erected by the Bill of Rights," without any



showing of "compelling necessity." *Green v. United States*, 356 U.S. 165, 194, 216 (1958) (dissenting opinion).

This Court has vindicated the insights of these dissents. *Bloom* held that "in terms of those considerations which make the right to jury trial fundamental in criminal cases, there is no substantial difference between serious contempts and other serious crimes." 391 U.S. at 202. In reaching this conclusion the Court rejected the expansive concept of necessity *Debs* used to forestall the explicit terms of the Constitution. "Perhaps to some extent we sacrifice efficiency, expedition, and economy, but the choice in favor of jury trial has been made, and retained, in the Constitution. We see no sound reason in logic or policy not to apply it in the area of criminal contempt." *Id.* at 209.

The logic that compelled the result in *Bloom* is fully applicable here. Except in summary contempts, where this Court has recognized a need for immediate, untrammeled action, there is no necessity, and therefore no justification, for denying a defendant the protections of the Double Jeopardy Clause, which, like the right to a jury, "represents a fundamental ideal in our constitutional heritage." *Benton v. Maryland*, 395 U.S. 784, 794 (1969).

2. Petitioner never acknowledges the reasoning that has driven this transformation in the law of criminal contempt. Yet, petitioner urges the Court to jettison normal double jeopardy principles for determining if two prosecutions involve the "same offense," merely because one prosecution is a criminal contempt proceeding and

the other a prosecution under the criminal code. Petitioner has failed to show a compelling need for this encroachment upon the Constitution.

The different interests underlying criminal contempt proceedings and other criminal prosecutions, *see Young*, 481 U.S. at 800, do not create a necessity for separate proceedings.[1] If this case concerned a single proceeding, these different interests might indicate a legislative intent to allow cumulative punishments for contempt and a criminal code offense. As indicia of legislative intent, these separate interests would be important, because in the context of a single proceeding, "the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended." *Missouri v. Hunter*, 459 U.S. 359, 366 (1983).

This case, however, is about the need for separate *prosecutions*. Obviously a legislature may permit several social interests to be vindicated in a single proceeding, through the imposition of multiple punishments. *See, e.g., United States v. Woodward*, 469 U.S. 105, 109 (1985) (per curiam). Petitioner does not establish a necessity for separate prosecutions, however, by listing double jeopardy cases where different interests have been "taken into account," Pet. Br. 17, for the sole purpose of determining

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[1] As respondents' case demonstrates, the difference between the two interests is not always perceptible. Unlike the typical contempt case, where "the Judiciary is sanctioning conduct that violates specific duties imposed by the court itself, arising directly from the parties' participation in judicial proceedings," *Young*, 481 U.S. at 800 (footnote omitted), the duties to which respondents were subjected by the court – to obey the law – preexisted their participation in judicial proceedings.



if the legislature intended to allow cumulative punishments in a single proceeding. *See Ball v. United States*, 470 U.S. 856 (1985); *United States v. Woodward, supra; Albernaz v. United States*, 450 U.S. 333 (1981).[2]

Nor is there any basis for the specter petitioner raises of transformation of the limited contempt power into unconstitutional control over the Executive's power to prosecute crimes. Pet. Br. 18-21. The notion that a court needs absolute authority to conduct a non-summary contempt prosecution, despite the Executive's objection or before the Executive has an opportunity to bring a criminal code prosecution, cannot be reconciled with this Court's cases on the regulation of the contempt power.

In *Young* the Court held that the inherent judicial authority "to initiate contempt proceedings for disobedience to [court] orders . . . necessarily encompasses the ability to appoint a private attorney to prosecute the

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[2] In *Young*, the United States took the position that when a contemnor's conduct in violation of a court order also violates a federal criminal statute, a single prosecution fully protects both the court's authority and the interest underlying the criminal statute: "If the United States Attorney decides to prosecute the contemnor for the substantive offense, the interest underlying the contempt power – enforcing compliance with judicial orders – would also be vindicated." Brief for the United States as *Amicus Curiae* at 15, *Young v. United States ex rel. Vuitton et Fils S.A.* (No. 85-1329). If necessary, a count alleging contempt can be added to the indictment or information charging the criminal code offense. *Cf. United States v. Laurins*, 857 F.2d 529 (9th Cir. 1988) (indictment charging obstruction of justice and aiding and abetting contempt), *cert. denied*, 492 U.S. 906 (1989). *See generally* C. Wright, *Federal Practice and Procedure: Criminal 2d* § 710 & nn. 5-6 (1982).

contempt." 481 U.S. at 793. The Court cautioned, however, that exercise of this inherent power "must be restrained by the principle that 'only "[t]he least possible power adequate to the end proposed" should be used in contempt cases.' " *Id.* at 801 (quoting *United States v. Wilson*, 421 U.S. 309, 319 (1975) (quoting *Anderson v. Dunn*, 6 Wheat. 204, 231 (1821))). This "principle of restraint" means that a court may invoke its appointment power "only as a last resort." "The logic of this rationale is that a court ordinarily should first request the appropriate prosecuting authority to prosecute contempt actions, and should appoint a private prosecutor only if that request is denied." *Id.* at 801.

The referral process assures a prosecutor an opportunity to advise the court whether a privately prosecuted contempt proceeding threatens an anticipated or contemplated prosecution under the criminal code. In practice, many courts will defer to the prosecutor. A reasonable delay of the contempt prosecution under these circumstances allows the prosecutor thoroughly to consider and prepare all the appropriate charges, while avoiding the expense and inconvenience of a separate, privately conducted contempt trial. Neither *Young*'s language nor its guiding principle of restraint implies that judicial vindication demands such urgency that normally the prosecutor cannot be given reasonable time (if requested) to bring appropriate charges to enforce the criminal laws.[3]

[3] Significantly, the United States argued in *Young* that this referral process would be "particularly appropriate when the contemnor's conduct in violation of an injunction also contravenes a federal criminal statute . . . . " U.S. Brief at 15. Thus it is odd that the United States now portrays this procedural restraint as a judicial license to override the prosecutor's objections.



Moreover, even if *Young* leaves any uncertainty on this point, it is clear either Congress or this Court could solve what is essentially a conflict over timing. Both Congress and the Court may regulate "[t]he manner in which the court's prosecution of contempt is exercised . . . . " *Young*, 481 U.S. at 799. This broad power to impose "reasonable regulation" is limited only by the requirement that " 'the attributes which inhere in [the contempt power] and are inseparable from it can neither be abrogated nor rendered practically inoperative.' " *Ibid* (quoting *Michaelson v. United States ex rel. Chicago, St. P., M., & O. R. Co.*, 266 U.S. 42, 66 (1924)). Requiring a court to defer a non-summary contempt proceeding for a reasonable period of time, to accommodate the legitimate interests of a co-equal Branch, comports with the principle of restraint and does not unconstitutionally reduce a court's ability to protect itself. As this Court implicitly recognized in *Bloom*, unfettered judicial control over the timing of a non-summary contempt trial is not essential to the court's power of self-protection. 391 U.S. at 208-209. *Cf. Gompers v. United States*, 233 U.S. 604 (1914) (contempt power subject to statute of limitations).[4]

The facts in this case give no reason to fear that courts will run roughshod over federal prosecutors' calls

[4] Federal law currently imposes a far more comprehensive restraint on the criminal contempt powers of the court. Title 42 U.S.C. § 2000h-1 provides that because "[n]o person should be put twice in jeopardy under the laws of the United States[,] . . . an acquittal or conviction in a prosecution for a specific crime under the laws of the United States shall bar a proceeding for criminal contempt, which is based on the same act" arising under the Civil Rights Act of 1964.

for judicial restraint. The Assistant United States Attorney who prosecuted Dixon for contempt did not ask the judge to defer the contempt proceeding until trial on the cocaine possession indictment. In Foster's case, the United States Attorney's Office also did not request that the criminal contempt trial be postponed, apparently because the government clung to the mistaken notion, a year after the decision in *Young*, that a privately prosecuted criminal contempt proceeding is a "civil" matter. *See Young*, 481 U.S. at 804 ("criminal contempt proceedings arising out of civil litigation 'are between the public and the defendant, and are not a part of the original cause' ") (quoting *Gompers v. Bucks Stove & Range Co.*, 221 U.S. at 445).[5]

3. Unable to show any necessity for limiting the Double Jeopardy Clause, petitioner instead urges the Court to follow what it claims to be longstanding authority that successive prosecutions for contempt and a criminal code offense cannot place an individual in jeopardy twice for the same offense. *Cf. United States v. Felix*, 112 S.Ct. 1377 (1992) (conspiracy and substantive offense are not same offense). Petitioner's premise is wrong. This Court has never "held that successive prosecutions for contempt and for a substantive offense based on the same conduct were permissible." Pet. Br. 8.

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[5] Petitioner's "dual sovereignty" analogy lacks any merit. The doctrine does not apply "where the two tribunals that tried the accused exert all their powers under and by authority of the same government – that of the United States." *Grafton v. United States*, 206 U.S. 333, 354-355 (1907).



The language from *Debs* on which petitioner bases its argument (that a criminal prosecution would not be barred by a contempt prosecution) is clearly *dicta*. Because *Debs* involved the question whether the Constitution guarantees the right to a jury in a contempt trial, the issue of barring a subsequent prosecution under the criminal code was academic, *see* 158 U.S. at 594 ("If any criminal prosecution be brought . . . . " ), and the Court did not even decide whether the allegedly contemptuous acts violated any statute. *See id.* (defendants' acts "may or may not have been violations of the criminal law").[6]

*Colombo v. New York*, 405 U.S. 9 (1972) (per curiam), provided the first opportunity to address the issue now before the Court. Colombo was held in contempt, sentenced to 30 days in jail and fined after defying an order to respond to a grand jury's questions. He was then indicted under a provision of the penal code which made it a crime to commit a contempt of court. The New York Court of Appeals held that double jeopardy principles did not bar the indictment, because Colombo's initial contempt commitment was for civil contempt, and because he committed separate contemptuous acts by refusing the grand jury's questions and by disobeying the

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[6] Two cases involving Congress' contempt power are also unhelpful. *See In re Chapman*, 166 U.S. 661 (1897); *Jurney v. MacCracken*, 294 U.S. 125 (1935). Neither case involved two prosecutions or concerned the relationship between the Judiciary and the Executive. *Chapman* held that the statute making contempt of Congress a crime (now 2 U.S.C. § 194) is constitutional. 166 U.S. at 672. *Jurney v. MacCracken* held that the statutory offense of contempt of Congress does not impair Congress' inherent authority to punish a contempt. 294 U.S. at 151.

judge's order. 405 U.S. at 10. This Court held that "[f]or purposes of the Double Jeopardy Clause, petitioner was confined and penalized for criminal contempt." *Id.* at 11 (citations omitted). Because of a state law question whether the prosecutions covered one or two acts, the Court remanded to allow the New York court "the opportunity to reconsider the validity of the indictment under the Double Jeopardy Clause of the Constitution." *Ibid.*

This resolution would have been inappropriate if a criminal contempt – prosecuted in a judicially-initiated proceeding – could never be the "same offense" for successive prosecution purposes as a criminal code offense. Had the *dicta* in *Debs* been controlling, as petitioner urges, whether Colombo committed one or two acts would not have presented a constitutional question.[7]

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[7] *Colombo* arguably did more than reject any commitment to *Debs' dicta*. The history of the litigation suggests the Court was rejecting the argument that successive prosecutions are permitted merely because two arms of the government prosecute in pursuit of separate interests. *Colombo* had come before the Court once before. *Colombo v. New York*, 400 U.S. 16 (1970) (per curiam). *See Colombo*, 405 U.S. at 12 (Douglas, J., dissenting). The Court had remanded for further consideration in light of *Waller v. Florida*, 397 U.S. 387 (1970), which held that a State and a municipality are the same sovereign for double jeopardy purposes. 397 U.S. at 394-395.

On the first remand the New York Court of Appeals concluded that successive prosecution was not barred, because the judicially-initiated contempt "vindicate[s] the power of our courts" while the statutory crime "protects the interest of the State to obtain evidence which will benefit the community as a whole . . . . " *People v. Colombo*, 271 N.E.2d 694, 695 (N.Y. 1971),



*Menna v. New York*, 423 U.S. 61 (1975) (per curiam), involved the relationship between the same New York statutes. This time, petitioner pled guilty to the criminal code indictment after his motion to dismiss on double jeopardy grounds was rejected. The New York Court of Appeals held that petitioner waived any double jeopardy claim by pleading guilty. *Id.* at 61-62. This Court reversed, holding that a counseled guilty plea may be vacated "[w]here the State is precluded by the United States Constitution from haling a defendant into court on a charge. . . . " *Id.* at 62. As in *Colombo*, the Court remanded for a determination of the double jeopardy argument, on whose merits the Court expressed "no view." *Id.* at 63. As in *Colombo*, a remand would have been inappropriate if *Debs' dicta* were controlling.[8]

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*vacated*, *Colombo v. New York*, 405 U.S. 9 (1972), *on remand*, 293 N.E.2d 247 (N.Y. 1972).

New York opposed the second petition for writ of certiorari in part on the grounds that *Debs* supported the judgment. *See* Supp. Br. in Opp. to Pet. at 8, *Colombo v. New York* (No. 71-352). This Court would not have remanded a second time if persuaded that this separate interest analysis resolved the double jeopardy question. After the second remand, the Court of Appeals dismissed the indictment. 293 N.E.2d 247.

[8] Petitioner dismisses *Colombo* and *Menna* in a footnote, because the criminal code offense in those cases was entitled "contempt." Pet. Br. 14 n.15. Petitioner has not suggested, however, that the result in this case should turn on the label attached to a criminal code offense. New York could have called the criminal code offense "obstruction of justice" or "breach of peace in vicinity of the court." Under petitioner's theory, prosecution of these renamed offenses after a previous contempt prosecution would necessarily be for different offenses, because the two prosecutions serve different interests, and different

Decisions by lower federal and state courts also refute petitioner's argument. The issue has arisen twice in federal court in the last 65 years, and in both cases the courts barred further prosecution, after concluding that normal double jeopardy principles fully apply in deciding whether a contempt trial and a prosecution under the criminal code involve the same offense. *United States v. Haggerty*, 528 F. Supp. 1286 (D. Colo. 1981) (prosecution for striking while holding government position barred by prior contempt proceeding for violating order not to strike); *United States v. United States Gypsum Company*, 404 F. Supp. 619 (D.D.C. 1975) (contempt proceeding for violating price fixing decree barred by prosecution for price fixing). The facts of these cases are essentially indistinguishable from respondents' case, because each involved a contempt prosecution that in a practical sense required the government to prove the commission of an offense under the criminal code. *See Haggerty*, 528 F. Supp. at 1297 (felony prosecution "essentially a prosecution for a lesser included offense" of contempt); *United States Gypsum Co.*, 404 F. Supp. at 622 (contempt proceeding would be "replay" of criminal prosecution). In addition, before this Court's decision in *Grady*, several state courts (including some which looked to *Colombo* for guidance) had concluded that normal double jeopardy principles apply in determining whether a contempt

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branches of government initiate them. This result cannot be reconciled with *Colombo* and *Menna*.



prosecution bars subsequent prosecution under the criminal code.[9]

Petitioner is also mistaken in claiming that the reasoning in the "overwhelming majority" of pre-*Grady* lower court decisions "remain[s] sound today." Pet. Br. 8. The reasoning in petitioner's cases has been undermined by changes made by this Court in the law of contempt and double jeopardy, independent of this Court's decision in *Grady*.

Many of the cases petitioner relies on found no double jeopardy bar after applying the test of *Blockburger v. United States*, 284 U.S. 299, 304 (1932), which compares the abstract elements of the statutory definitions of contempt and the criminal code offense.[10] These cases show merely that if the multiple prosecution inquiry is restricted to the *Blockburger* legislative intent question, then generally a criminal code offense will not be the same offense as contempt. Whether or not *Blockburger* should be the only test in successive prosecutions, *see infra* at 29-49, the resolution of that issue is not unique to

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[9] *State v. Hope*, 449 So. 2d 633 (La. Ct. App. 1989); *State v. McIntyre*, 764 P.2d 972 (Or. Ct. App. 1988) (state law grounds); *People v. Rodriguez*, 514 N.E.2d 1033 (Ill. App. Ct. 1987), *appeal denied*, 520 N.E.2d 391 (Ill. 1988); *State v. Thompson*, 659 P.2d 383, 386 (Or. 1983) (state law grounds) (citing *Colombo*); *People v. Lombardo*, 123 Cal. Rptr. 755, 758 (Cal. App. 1975) (citing *Colombo*).

[10] *United States v. Ferrugia*, 604 F. Supp. 668 (E.D.N.Y. 1985); *People v. Totten*, 514 N.E.2d 959 (Ill. 1987); *Commonwealth v. Gallarelli*, 362 N.E.2d 923 (Mass. 1977); *Commonwealth v. Allen*, 486 A.2d 363 (Pa. 1984), *cert. denied*, 474 U.S. 842 (1985); *State v. Sammons*, 656 S.W.2d 862 (Tenn. Crim. App. 1982).

the law of criminal contempt.[11] These cases, therefore, do not establish an exception to double jeopardy law for successive prosecutions involving criminal contempts and prosecutions under the criminal code.

Many of the cases cited by petitioner justify their result only by uncritical citation to *Debs* and its progeny or the "established rule" that double jeopardy is no bar to successive prosecutions involving criminal contempt and criminal code offenses.[12] The rest are either summary contempt cases[13] or rely on a concept of necessity this

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[11] For example, petitioner cites *People v. Totten*, 514 N.E.2d 959 (Ill. 1987), which applied *Blockburger* to find no jeopardy bar between contempt and battery prosecutions. In a subsequent case, however, an Illinois court applied *Totten* (and therefore *Blockburger*) and concluded that while a criminal contempt conviction did not bar a burglary prosecution, it did bar a child abduction prosecution under a statute which required proof of violation of "a valid court order." *People v. Rodriguez*, 514 N.E.2d 1033, 1037 (Ill. App. 1987).

[12] *Church v. State*, 111 So.2d 228 (Miss. 1950); *Nicholas v. Commonwealth*, 45 S.E.2d 305 (Va. 1947); *Orban v. United States*, 18 F.2d 374 (6th Cir. 1927); *Hansen v. United States*, 1 F.2d 316 (7th Cir. 1924); *Ex parte Morris*, 227 P. 914 (Cal. 1924); *Lewinsohn v. United States*, 278 F. 421 (7th Cir. 1921), *cert. denied*, 258 U.S. 630 (1922); *Long v. Commonwealth*, 197 S.W. 843 (Ky. 1917); *Merchants' Stock & Grain Co. v. Board of Trade*, 201 F. 20 (8th Cir. 1912); *Chicago Directory Co. v. United States Directory Co.*, 123 F. 194 (C.C.S.D.N.Y. 1903); *Fisher v. McDaniel*, 64 P. 1056 (Wyo. 1901); *Middlebrook v. State*, 43 Conn. 257 (1876).

[13] *United States v. Ferrugia*, 604 F. Supp. 668 (E.D.N.Y. 1985); *Maples v. State*, 565 S.W.2d 202 (Tenn. 1978); *United States v. Rollerson*, 449 F.2d 1000 (D.C. Cir. 1971); *United States v. Mirra*, 220 F. Supp. 361 (S.D.N.Y. 1963); *O'Malley v. United States*, 128 F.2d 676 (8th Cir. 1942), *rev'd sub nom. Pendergast v. United States*, 317 U.S. 412 (1943); *Long v. Commonwealth*, 197 S.W. 843 (Ky. 1917); *State v. Yancy*, 4 N.C. (Car. L. Dep.) 133 (1813).



Court has rejected for non-summary contempts.[14] In light of the principle of necessity that has animated all of this Court's contemporary contempt decisions, petitioner's cases do not provide any basis for refusing an individual successively prosecuted for criminal contempt and a criminal code offense the protection of the Double Jeopardy Clause.

4. *Amici* argue that if a privately prosecuted contempt can raise a constitutional bar to a subsequent criminal prosecution, the States' civil protection schemes will be seriously undermined as domestic violence victims are forced to choose between contempt proceedings and criminal prosecutions. In *amici*'s view, private contempt prosecutions provide a mechanism for preventing additional harm to domestic violence victims, because public prosecutors do not give sufficient priority to contempts based on violations of protection orders, and law enforcement officials sometimes hinder effective criminal prosecution.

These are serious concerns. Effective response to the problem of domestic violence, however, does not require erosion of the Double Jeopardy Clause. Moreover, *amici*'s arguments are largely misdirected. Criminal contempt is not designed to be a surrogate for an inadequate criminal

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[14] *State v. Newell*, 532 So.2d 1114 (Fla. Dist. Ct. App. 1988); *Barrowman v. State ex rel. Evans*, 381 S.W.2d 251 (Tenn. 1964). Petitioner's only other case, *State v. Chapman*, 739 P.2d 310 (Idaho 1987), merely finds that the defendant committed two acts.

justice system. Criminal contempt proceedings "are designed to serve the limited purpose of vindicating the authority of the court." *Young*, 481 U.S. at 800. Although a victim of domestic violence may derive some security from a contempt punishment, this is an "incidental benefit" of the criminal contempt process, *see Gompers v. Bucks Stove & Range Co.*, 221 U.S. at 443, and therefore cannot be essential to the court's ability to "preserve respect for the judicial system itself." *Young*, 481 U.S. at 800. *Amici*'s claim that a complainant prosecuting a criminal contempt "proceed[s] in her own right in an equity cause," *Amici* Br. 17, cannot be reconciled with the statements in *Young*, 481 U.S. at 804, and *United States v. Providence Journal Co.*, 485 U.S. 693, 700 (1988), that a private attorney prosecuting a criminal contempt represents the government. In urging the Court to allow a criminal contempt proceeding to do the work of the criminal justice system, *amici* undermine the rationale for the criminal contempt power.

For the same reason, although *amici* understandably look to criminal contempt for quicker relief than an unresponsive criminal justice system provides, they are asking criminal contempt to serve the wrong function. The primary purpose of a criminal contempt proceeding is to protect the court. To protect the community, States may enact regulatory schemes for detaining dangerous persons pending trial. *See United States v. Salerno*, 481 U.S. 739 (1987) (federal pretrial detention statute); *United States v. Edwards*, 430 A.2d 1321 (D.C. 1981) (en banc) (D.C. pretrial detention statute), *cert. denied*, 455 U.S. 1022 (1982).

Similarly, the role of interested parties in prosecuting contempts based on violations of protection orders does



not justify curtailment of the Double Jeopardy Clause. In *Young*, this Court used its supervisory authority over the federal courts "to hold that counsel for a party that is the beneficiary of a court order may not be appointed as prosecutor in a contempt action alleging a violation of that order." 481 U.S. at 809 (footnote omitted). Because the Court did not decide the constitutionality of this practice, *see id.* n.21, States and local jurisdictions may still follow it.[15] However, a policy which is incompatible with notions of fairness in federal court, *id.* at 809, cannot be a necessary component of the ability of State judges to vindicate their authority. In fact, the willingness of victims' attorneys to prosecute criminal contempts may encourage busy prosecutors in state courts not to put their limited resources behind domestic violence matters.

There is good reason to believe that as the States continue to take domestic violence more seriously, the criminal justice system will assume a burden now improperly borne by criminal contempt proceedings. State court family judges have recommended "[m]aking violation of protection orders a criminal offense," National Council of Juvenile and Family Court Judges, *Family Violence: Improving Court Practice* § I(3)(l) (1990) (hereafter *"Improving Court Practice"*), and thirty-eight States now have statutes which appear to provide criminal penalties for the violation of protection orders or

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[15] The District of Columbia Court of Appeals has never decided whether complainants may prosecute contempts arising out of CPO violations. One trial judge has held that *Young* does not preclude this practice in the District of Columbia courts. *Castellanos v. Novoa*, 127 Daily Wash. L. Rptr. 1192, 1193-94 (D.C. Super. Ct. April 27, 1989).

certain aspects of these orders.[16] New policies for combatting domestic violence include mandatory arrest requirements and mandatory training for police officers, *see, e.g.*, D.C. Code Ann. §§ 16-1031, -1034 (1991 Supp.); D.

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[16] Alaska Stat. § 11.56.740 (Supp. 1991); Ariz. Rev. Stat. Ann. §§ 13-3602(I) (Supp. 1991), 13-2810 (1989); Ark. Code Ann. §§ 9-15-207, 5-53-134 (Michie Supp. 1991); Cal. Penal Code § 273.6 (West 1988 & Supp. 1992); Colo. Rev. Stat. Ann. § 18-6-803.5 (West Supp. 1991); Conn. Gen. Stat. Ann. § 46b-38c(e) (West 1992); Del. Code Ann. tit. 11, § 1271 (1987 & Supp. 1990) (crime of contempt); Fla. Stat. Ann. § 741.31 (West Supp. 1992); Ga. Code Ann. § 19-13-6(b) (Michie 1991); Haw. Rev. Stat. § 586-11 (1988); Idaho Code § 39-6312 (Supp. 1992); Ill. Rev. Stat. ch. 40, para. 2312-21(c), ch. 38, para. 12-30 (Smith-Hurd Supp. 1992); Kan. Stat. Ann. § 60-3107(g) (Supp. 1991); Ky. Rev. Stat. Ann. § 403.760 (Baldwin 1990) (crime of contempt); Me. Rev. Stat. Ann. tit. 19, § 769 (West 1981); Md. Code Ann. Fam. Law §§ 4-507, 4-510 (1991); Mass. Gen. Laws Ann. ch. 209A, § 7 (West Supp. 1992); Minn. Stat. Ann. § 518B.01, Subd. 14(a) (West 1990 & Supp. 1992); Mo. Stat. Ann. § 455.085(8) (Vernon Supp. 1992); Mont. Code Ann. § 45-5-626 (1991); Neb. Rev. Stat. § 42-924 (1988); Nev. Rev. Stat. Ann. § 125.560 (Michie Supp. 1991); N.J. Stat. Ann. §§ 2C:25-15(b), 2C:29-9(b) (West Supp. 1991); N.Y. FAM. CT. ACT § 846-a (McKinney 1983); N.D. Cent. Code § 14-07.1-06 (1991); Ohio Rev. Code Ann. § 2919.27 (Anderson 1987 & Supp. 1991); Okla. Stat. Ann. tit. 22, § 60.6 (West Supp. 1992); R.I. Gen. Laws § 15-15-3(3) (1988 & Supp. 1991); S.C. Code Ann. § 16-25-50 (Law. Co-op 1985); S.D. Codified Laws Ann. § 25-10-13 (1984); Tex. Fam. Code Ann. § 71.16(b) (West Supp. 1992); Utah Code Ann. §§ 30-6-6(4), 76-5-108, 77-36-3(2) (Supp. 1991); Vt. Stat. Ann. tit. 13, § 1030; tit. 15, § 1104(d) (Supp. 1991); Va. Code Ann. § 16.1-253.2 (Michie Supp. 1992); Wash. Rev. Code Ann. § 26.50.110(1) (West 1986 & Supp. 1992); W. Va. Code § 48-2A-11 (1992); Wis. Stat. Ann. § 813.12(8) (West Supp. 1991); Wyo. Stat. §§ 35-21-106(c), 6-4-404 (1988).



Robinson, Congressional Research Service, *Family Violence: Background, Issues, and the State and Federal Response* 25 (1992), improved charging policies less intimidating to victims, and court docket priorities reflecting the seriousness of family violence. *See Improving Court Practices* at §§ III(B)(4) & (C)(11). For reasons apparently independent of the constitutional prohibition against multiple prosecutions for the same offense, state judges have recommended that "cases involving the same family and family issues should be consolidated in *one* court proceeding utilizing the full range of civil and criminal remedies." *Id.* at § III(C)(10) (emphasis added).

These and other steps can and probably should be taken. However, they do not require or justify any restriction of a right expressly provided in the Constitution.

### B. Under Any Test Other Than A Strict Application Of *Blockburger*, It Is Clear That Respondents Were Prosecuted Twice For The Same Offense

Petitioner argues that *Grady v. Corbin* should be read to allow successive prosecutions in this case and that, if *Grady* cannot be read that narrowly, it should be overruled. These alternative arguments invoke strikingly different interpretations of *Grady*, as fully consistent with and limited by the Court's precedents, primarily *Harris v. Oklahoma*, 433 U.S. 682 (1977), and *Illinois v. Vitale*, 447 U.S. 410 (1980), on the one hand, and as a radical departure from established precedent, on the other hand. A full examination of petitioner's arguments requires a careful

assessment of *Grady*. An easy answer to petitioner's arguments, however, is that whether *Grady* was right or wrong ultimately makes no difference in this case. Under any test, with the possible exception of the most formalistic application of the test in *Blockburger v. United States*, 284 U.S. at 304, it is clear that further prosecution of respondents would violate the prohibition in the Double Jeopardy Clause of the Fifth Amendment against successive prosecutions for the same offense.

1. In *Grady*, this Court concluded that a prosecution for driving while intoxicated and failing to keep right of the median barred a subsequent prosecution for manslaughter, criminally negligent homicide and third-degree reckless assault, where the State admitted that it would reprove the offense of failing to keep right of the median in order to establish that the defendant operated the vehicle in a criminally negligent and reckless manner. The Court's holding in *Grady* has two significant aspects. First, the Court made clear that in a situation involving multiple prosecutions, as opposed to multiple punishments imposed after a single trial, an examination of the abstract elements of the offenses will not necessarily resolve the constitutional issue, because even if the legislature intended for two offenses to be different, legislative intent is not the end of the inquiry. Thus, strict application of the *Blockburger* test, which looks at the abstract elements of an offense as defined by the legislature as a tool for determining legislative intent, will not necessarily resolve whether successive prosecutions violate the double jeopardy guarantee. 495 U.S. at 521.

*Grady*'s analysis reflects sound principles of double jeopardy jurisprudence and a history in which this Court



has refused to allow the guarantee against successive prosecutions to be sacrificed to any mechanical test. Building on *In re Nielsen*, 131 U.S. 176 (1889), where the Court barred successive prosecutions for adultery and cohabitation, this Court repeatedly has recognized that, in successive prosecution cases, application of the *Blockburger* legislative intent test does not necessarily end the constitutional inquiry. Thus, in *Brown v. Ohio*, 432 U.S. 161, 166 n.6 (1977), the Court cited *Nielsen* and stated that "[e]ven if two offenses are sufficiently different to permit the imposition of consecutive sentences, successive prosecutions will be barred in some circumstances where the second prosecution requires the relitigation of factual issues already resolved by the first." In *Harris*, although felony murder and robbery were separate offenses under *Blockburger*, the Court cited *Nielsen* and *Brown* to support its holding that "[w]hen, as here, conviction of a greater crime, murder, cannot be had without conviction of the lesser crime, robbery with firearms, the Double Jeopardy Clause bars prosecution for the lesser crime after conviction of the greater one." 433 U.S. at 682. In *Vitale*, the Court relied on *Harris* to suggest that a prosecution for manslaughter would be barred by a previous conviction for failing to reduce speed to avoid an accident if "to sustain its manslaughter case the State . . . find[s] it necessary to prove a failure to slow or to rely on conduct necessarily involving such failure." 447 U.S. at 420.

*Garrett v. United States*, 471 U.S. 773 (1985), also reflects this Court's recognition that, in the context of successive prosecutions, the Double Jeopardy Clause requires a test that does more than measure adherence to

legislative intent. Garrett was first prosecuted for importation of marijuana, then for engaging in a continuing criminal enterprise (CCE). Proof of the importation offense was used to establish one of the predicate offenses needed to prove the CCE offense. After reviewing the legislative history of the CCE statute, the Court found clear legislative intent to permit prosecution for CCE and the predicate offenses. *Id.* at 778-786. Because the case involved successive prosecutions, however, the Court found it necessary to go beyond an analysis of the statute and the intent of the legislature: "In order to properly analyze the successive prosecution issue, we must examine not only the statute which Congress enacted, but also the charges which form the basis of the Government's prosecution here." *Id.* at 786. The Court then examined in detail "the *conduct* in which Garrett was charged with engaging." *Id.* at 788 (emphasis added).[17]

In *United States v. Halper*, 490 U.S. 435, 451 & n.10 (1989), this Court again underscored the greater protections afforded in successive prosecution cases. *See also United States v. Sabella*, 272 F.2d 206, 211 (2d Cir. 1959) (Friendly, J.) (refusing to give undue effect to " 'refinements . . . so thin that, if they hold, the old and substantial protection against trial or conviction more than once for the same offense is but a shadow of its intended self' ") (quoting *District of Columbia v. Buckley*, 128 F.2d 17, 22 (D.C. Cir.), *cert. denied*, 317 U.S. 658 (1942)), *cited with*

[17] The Court concluded that the case came within the exception to the Double Jeopardy Clause first recognized in *Diaz v. United States*, 223 U.S. 442 (1912). *See* 471 U.S. at 791.



*approval in United States v. Sanabria*, 437 U.S. 54, 72 n.28 (1978).[18]

The second aspect of the decision in *Grady* is the test it articulates for determining whether, as a practical matter, in light of the government's theory of prosecution, the two offenses are the same. 495 U.S. at 521 & n.11. In resolving that question, the statutory elements of the offense are, of course, the starting point. But the Court recognized that the Constitution is not satisfied simply because the two offenses in theory may require proof of different facts, if, in practice, the government will have to reprove one offense in order to prove the other.

Petitioner does not appear to quarrel with *Grady*'s conclusion that double jeopardy means more than legislative intent in successive prosecutions. Its argument, rather, is that the cases in which the *Blockburger* test can be ignored should be limited to the precise circumstances in *Harris*, *Vitale* and *Grady*. In all other circumstances (except where *Blockburger* would bar a subsequent prosecution, such as RICO or CCE), petitioner maintains that

[18] Prior to *Grady*, a number of lower courts had reached the same conclusion. As the Court of Appeals for the Fourth Circuit recognized, "[g]iven the multiplicity of offenses that may arise from a single criminal transaction, the formalistic *Blockburger* test, with its narrow focus on the technical elements of the offenses charged, is inadequate to vindicate this constitutional guarantee against retrial. The general test for determining whether successive prosecutions involve the 'same offense' is therefore a more flexible and pragmatic one, which focuses not on the formal elements of the two offenses but rather on the proof actually utilized to establish them." *United States v. Ragins*, 840 F.2d 1184, 1188 (4th Cir. 1988). *See also State v. Lonergan*, 566 A.2d 677 (Conn. 1989), *cert. denied*, 496 U.S. 905 (1990).

*Blockburger* should be strictly applied. Pet. Br. 42-46. There are several significant flaws in petitioner's argument.

First and most important, with or without the test articulated in *Grady*, this case fits squarely within the scope of the principles on which the Court has relied in articulating the protections against multiple prosecutions. *Grady* simply confirms that *Harris* and *Vitale* control this case.

2. In an obvious and practical sense, the federal government has already prosecuted respondents for the criminal code offenses in the pending indictments. At their contempt trials respondents were charged with violating court orders by committing the criminal code offenses of possession with intent to distribute cocaine, assault and threats, and the trial courts required the government to prove commission of these offenses as elements of the contempts. In any further prosecution of respondents, the government would necessarily prove for a second time these same offenses, based on the identical conduct, it proved successfully (in Foster's case, partially successfully) at the first trials. The only difference would be that during the second round of prosecutions, the government could prove less than before. To convict respondents of contempt, the government had to prove their knowledge of the court orders not to violate the criminal code (in Foster's case specified provisions of the criminal code). To convict respondents of the pending offenses, the government would not have to prove their knowledge of the law.



As the Court made clear in *Harris*, when the offense charged in the first prosecution requires the government to prove as an element the crime it seeks to prosecute subsequently, the Double Jeopardy Clause stands as a bar to further prosecution. Although a contempt theoretically could be proved without establishing commission of a criminal code offense, and proof of a criminal code offense does not necessarily establish an element of all contempts, respondents were charged with contempts which made it necessary for the government to prove all the ingredients of the criminal code offenses.[19]

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[19] Petitioner agrees that under *Harris* an offense which includes other offenses by "generic reference" is the "same offense" for double jeopardy purposes as any specific offense included by reference in the initial charging document. *See* Pet. Br. 28 n.13.

Contempt is perhaps the most comprehensive of all "generic reference" offenses. In fact, 18 U.S.C. § 401 does not so much define a crime with statutory elements, as recognize a judicial power to punish certain classes of conduct as contempts. *See* R. Goldfarb, *The Contempt Power* 232 (1963) (Contempts "are not offenses defined by a criminal statute as are other crimes. Contempt is the statutory creation of a power, not an offense"). The Oklahoma felony murder statute involved in *Harris* restricted the indictment to the incorporation of a felony. *See Vitale*, 447 U.S. at 420 n.9. A document charging criminal contempt may incorporate by reference any crime in the entire code, so long as this incorporation is consistent with the terms of the original court order.

Moreover, so long as the court provides a jury in the contempt trial, there is no statutory limit in 18 U.S.C. § 401 (or D.C. Code Ann. § 11-944 (1989 Repl.)) to the sentence that could be imposed. In this sense, the contempt is not only the more inclusive offense, it is potentially the "greater" offense as well. Petitioner misconstrues District of Columbia law in characterizing the contempt offenses applicable to respondents as "petty

Respondents also prevail under the multiple prosecution test in *Vitale*. In *Vitale* the State attempted to prosecute the defendant for manslaughter after his previous conviction for failing to reduce speed to avoid a fatal collision. On the basis of an analogy to *Harris*, the Court suggested that "if in the pending manslaughter prosecution Illinois relies on and proves a failure to slow to avoid an accident as the reckless act necessary to prove manslaughter, Vitale would have a substantial claim of double jeopardy. . . . " 447 U.S. at 421. There is no dispute in this case that the government found it necessary to "rel[y] on and prove[]" the crimes defined by the criminal code at respondents' contempt trials.[20]

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offenses." Pet. Br. 20. It appears that both respondents could have been prosecuted under § 11-944, had the courts chosen to do so. *See Caldwell v. United States*, 595 A.2d 961, 964-66 (D.C. 1991) (because legislative history of D.C. Code § 23-1329 reveals no intent by Congress to override the unlimited sentencing provisions of § 11-944 in cases involving violations of pretrial release conditions, § 11-944 remains available).

Petitioner also misstates the penalty in 1988 for possession of cocaine with intent to distribute it. The applicable provision is D.C. Code Ann. § 33-541(a)(2)(B) (1988 Repl.) (5 years) and not D.C. Code Ann. § 33-541(a)(2)(A) (1988 Repl.) (15 years), as petitioner contends. Pet. Br. 20-21 n.8, 3a. *Compare* D.C. Code Ann. § 33-501(15) (1988 Repl.) *with* D.C. Code Ann. § 33-501(15)(D) (1991 Supp.) (now defining cocaine as "narcotic drug" within meaning of § 33-541).

[20] Petitioner's effort to distinguish *Vitale* and *Grady* is unavailing. "Unlike in *Vitale* and *Grady*," according to petitioner, "[t]he substantive crimes [in respondents' case], as legally defined, establish nothing with respect to the offense of contempt. . . . " Pet. Br. 31. But if that were not equally true in *Vitale* and *Grady*, those cases could have been decided under a strict application of *Blockburger*, rather than under a test that



As the Court recently recognized in *United States v. Felix*, 112 S. Ct. 1377, 1384 (1992), *Grady* was simply an application of the rule suggested in *Vitale*. *Grady* is significant here because its articulation of the practical sense in which two offenses based on the same conduct are the same offense for multiple prosecution purposes confirms the applicability of the *Vitale/Grady* rule to this case.[21]

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included an examination of the government's theory of prosecution to determine whether the assault and robbery charges were "*in effect* lesser included offenses" of the felony murder and manslaughter offenses. Pet. Br. 26 (emphasis added). Thus it muddies the water for petitioner to suggest that "[e]ven without reference to the particular facts of those cases, the Court viewed the traffic violation as sufficient to prove the 'carelessness' element" of the manslaughters. Pet. Br. 30. As *Grady* and *Vitale* make clear, reference must be made to *something* beyond the legal definition of the offenses. Petitioner elsewhere concedes that the something is "the State's theory of the case. . . . " Pet. Br. 26. Petitioner does not dispute that the prosecutor's theory of the case required proof of the criminal code offenses in respondents' case. For similar reasons, it is irrelevant that a non-technical species of lesser included offense will not meet the technical definition of lesser included offense. *See Schmuck v. United States*, 489 U.S. 705, 717, 718 (1989). Pet. Br. 30.

[21] The Court offered two formulations of its test, depending upon the order of prosection. First, "the Double Jeopardy Clause bars any subsequent prosecution in which the government, to establish an essential element of an offense charged in that prosecution, will prove conduct that constitutes an offense for which the defendant has already been prosecuted." 495 U.S. at 521 (footnote omitted). "Similarly, if in the course of securing a conviction for one offense the State necessarily has proved the conduct comprising all of the elements of another offense not yet prosecuted (a 'component offense'), the Double Jeopardy Clause would bar subsequent prosecution of the component offense." *Id.* n.11.

Respondents' case not only fits easily within the *Grady* formulation, as the court of appeals found and petitioner concedes, but it also appears to be precisely the type of situation the Court had in mind in formulating the test. *Grady* arose in the context of the "classically simple situation presented in *Brown* [v. *Ohio*]. . . . " *Felix*, 112 S.Ct. at 1385 (quoting *Garrett v. United States*, 471 U.S. at 789). *Brown* involved a discrete course of conduct underlying the offense of joyriding, circumscribed in time and place, which was entirely congruent with the offense of auto theft. "Every minute that Nathaniel Brown drove or possessed the stolen automobile he was simultaneously committing both the lesser included misdemeanor and the greater felony. . . . " *Garrett*, 471 U.S. at 789.

The same is true in respondents' case. At every moment when Dixon acted contemptuously by possessing cocaine with the intent to distribute, he was violating D.C. Code Ann. § 33-541(a)(1), and at every moment he violated the criminal code he was simultaneously in contempt. Foster's case presents the same congruence of conduct.

Moreover, even if the order of prosecution in respondents' cases were reversed, they would present common sense examples of *Grady*'s "essential element" requirement. Proof of the criminal code offenses formed the essence, indeed nearly the entirety, of the initial prosecutions. The judge at Dixon's trial considered proof that Dixon knew of the release condition to be a "technicality," because "the Government's burden [was] to show that there was in fact a crime committed by the defendant while he was on pretrial release." J.A. 14. The judge at



Foster's trial made only passing reference to Foster's awareness of the CPO. J.A. 39. The reality was that respondents' liberty depended on whether the government could prove they committed criminal code offenses. If those offenses were successfully prosecuted, there was no other conduct which had to be established.

Finally, these cases present none of the difficulties in drawing a line between the test in *Grady* and the endorsement in *Dowling v. United States*, 493 U.S. 342 (1990), of the "principle that the introduction of relevant evidence of particular misconduct in a case is not the same thing as prosecution for that conduct." *Felix*, 112 S.Ct. at 1383 (footnote omitted). In respondents' cases, the two crimes were identical in both time and place, the conduct linking the two offenses was entirely symmetrical, and, unlike *Felix* (or the typical Federal Rule of Evidence 404(b) situation), the factfinder's failure to conclude that the other crime was proved beyond a reasonable doubt would be fatal to the government's proof of criminal contempt as a matter of law. *See id.* at 1382.

Because respondents already have been prosecuted for the same offense, further prosecution would violate every principle this Court has identified as animating the protection against multiple prosecutions. As petitioner concedes, Pet. Reply on Pet. for Cert. at 9, a defendant charged with non-summary contempt must run the same "gantlet" as any other defendant. *See Green v. United States*, 355 U.S. 184, 190 (1957). A second prosecution for the same offense requires the defendant to run the same "gantlet" twice and subjects him or her to exactly the "embarrassment, expense . . . ordeal and . . . continuing state of anxiety" the Double Jeopardy Clause forbids. *Id.*

at 187. What the Double Jeopardy Clause establishes is, in effect, " 'a constitutional policy of finality for the defendant's benefit,' " *Brown v. Ohio*, 432 U.S. at 165 (quoting *United States v. Jorn*, 400 U.S. 470, 479 (1971) (plurality opinion)), a policy that "protects the accused from attempts to relitigate the facts underlying a prior acquittal" (as in Foster's case) and "from attempts to secure additional punishment after a prior conviction and sentence." *Id.* at 165-166.

3. Even if it were necessary to rely on the *Grady* test in order to decide this case, this Court should reject petitioner's invitation to overrule *Grady*, a precedent barely two years old that was reaffirmed by this Court just last Term. As this Court eloquently explained in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 60 U.S.L.W. 4795, 4801 (June 29, 1992) (citations omitted), "The obligation to follow precedent begins with necessity. . . . Indeed, the very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable."

Petitioner's attempt to justify its request that the Court overrule *Grady* by urging that *Grady* is a departure from past precedents and has bred confusion in the lower courts is not borne out by case law. In addition, although petitioner insists that the *Grady* test should be rejected, it offers no replacement that is either workable or consistent with the double jeopardy interests at stake in multiple prosecutions. Instead, petitioner makes the remarkable argument that *Blockburger*, a test for determining legislative intent, should be determinative even in multiple prosecutions. Petitioner offers no principled



explanation of how the *Blockburger* test can satisfy the additional interests at stake in multiple prosecution cases.

Despite the impressive authority on which *Grady* is founded, petitioner asserts that *Grady* is inconsistent with a line of cases in which the Court has applied the "elements test" in successive prosecution cases. In particular, petitioner asserts that, contrary to the *Grady* Court's understanding, *In re Nielsen*, "is consistent with the use of the elements test to determine whether successive prosecutions are permitted." Pet. Br. 38.[22] If, by "elements

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[22] Petitioner asserts that the majority in *Grady* was incorrect in suggesting that the Court has not applied the elements test to successive prosecution claims since *Nielsen*. Pet. Br. at 37. In fact, what the majority in *Grady* said was that "this Court has not interpreted the Double Jeopardy Clause as Justice Scalia would interpret it since at least 1889." 495 U.S. at 517-18 n. 8. The majority in *Grady* is correct that since *Nielsen*, the Court has refused to limit double jeopardy protection in successive prosecutions to a question of legislative intent and thus to an abstract comparison of the elements of the offense as defined by the legislature. The majority also is correct that English common law and early American cases long have been rejected as defining the limits of double jeopardy protection. *See United States v. Scott*, 437 U.S. 82, 88 & n.5 (1978) (discussing *United States v. Ball*, 163 U.S. 662 (1896)); Mayers & Yarbrough, *Bis Vexari*: New Trials and Successive Prosecutions, 74 Harv. L. Rev. 1, 4, 7, 29 (1960), cited in *Ashe v. Swenson*, 397 U.S. 436, 444 (1970) (common law different from our double jeopardy guarantee, but at common law, one criminal act or series of acts in a single plan likely to yield only one offense; hence, the common law ancestors of the Double Jeopardy Clause provided adequate protection against multiple prosecutions). *See also Gompers v. United States*, 233 U.S. 604, 610 (1914) (Holmes, J.) ("the provisions of the Constitution are not mathematical formulas having their essence in their form; they are organic, living institutions transplanted from English soil. Their significance is vital, not formal;

test," petitioner means the *Blockburger* formulation, its interpretation runs counter to the explicit recognition in *Nielsen* that, under the statutory definition of the offenses, adultery and cohabitation were not the same. It also runs counter to this Court's longstanding interpretation of *Nielsen*. *See, e.g., Brown v. Ohio*, 432 U.S. at 166 n.6. Petitioner's demonstration of the lengths to which the Court in *Nielsen* went to interpret cohabitation so that adultery could be considered a lesser included offense, Pet. Br. 38-40, hardly advances its argument. The significance of *Nielsen*, as Justice Powell and the Court recognized in *Brown*, is its decision to abandon the literal terms of the statutes in favor of its recognition that, as a practical matter, the defendant was being prosecuted twice for the same offense.

The other cases cited by petitioner are equally unavailing in casting *Grady* as a departure from precedent. Pet. Br. 37-38. To the extent that the cases relied on by petitioner can be said to have applied an "elements test," however, it certainly is not a literal application of the *Blockburger* test. In fact, the analysis in those cases is completely consistent with *Grady* and with the result reached by the court of appeals in this case.[23] In short,

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it is to be gathered not simply by taking the words and a dictionary, but by considering their origin and the line of their growth").

[23] Petitioner itself acknowledges that *Harris* (and thus *Payne v. Virginia*, 468 U.S. 1062 (1984) (per curiam)) do not "strict[ly] adhere[]" to the *Blockburger* test. Pet. Br. at 42. Rather, the Court looked beyond the elements of the offenses as defined by the legislature to find the underlying offense supporting a felony murder conviction to be a "species of lesser included



even the cases relied on by petitioner establish that *Blockburger* has never been the end of the inquiry in successive

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offense." *Vitale*, 447 U.S. at 420; *Felix*, 112 S. Ct. at 1384. In *Brown v. Ohio*, the offenses were the same under *Blockburger*, so the Court did not have to look beyond the offenses as defined by the legislature. The Court specifically stated, however, that the double jeopardy analysis was not limited to *Blockburger*. 432 U.S. at 166 n.6. *United States v. Bayer*, 331 U.S. 532 (1947), was decided on the basis of the longstanding rule recognized in *Felix* that conspiracy and a substantive offense are separate offenses. In *Grafton v. United States*, 206 U.S. 333 (1907), the Court never mentioned an elements test in determining that a prosecution for manslaughter barred a subsequent prosecution for murder. The Court "rest[ed its] decision . . . upon the broad ground that the same acts constituting a crime against the United States cannot, after the acquittal or conviction of the accused in a court of competent jurisdiction, be made the basis of a second trial of the accused for that crime in the same or in another court. . . ." *Id.* at 352. In *Burton v. United States*, 202 U.S. 344 (1906), the Court emphasized that because the defendant declined to plead additional facts and rested his double jeopardy defense on the face of the two indictments, the Court would have to decide the question "whether, upon the face of the record, *as a matter of law simply*," the offenses in the two indictments were the same. *Id.* at 379 (emphasis in original). The Court considered the evidence that would be necessary to prove the two offenses and concluded that "the same evidence would not have sustained each." *Id.* at 381.

The only case on petitioner's list that even purports to apply *Blockburger* in a successive prosecution case is *Gavieres v. United States*, 220 U.S. 338 (1911). In *Gavieres*, the Court determined that "evidence sufficient for conviction under the first charge [being drunk in public] would not have convicted under the second indictment [insulting a public official]," *id.* at 343, because in the first indictment, it was unnecessary to prove insult to a public official and in the second, it was unnecessary to prove that the defendant was drunk in a public place. Although the facts in the opinion are limited, it appears that

prosecutions. Rather, as *Nielsen*, *Brown*, *Harris*, *Vitale* and *Garrett* demonstrate, the Constitution also forbids a separate prosecution if, because of the facts of the case and the government's theory of prosecution, the government necessarily will prove the same offense twice.

Rather than a "departure from a long and unbroken string of precedent," Pet. Br. 35, *Grady* is no more radical than the precedents on which it relies. As the United States argued in *Felix*:

> [t]he *Grady* Court's formulation appears . . . to be an effort to put in general terms the . . . modest point that in order for two crimes to constitute the "same offense," one of them must be a lesser included offense of the other, either as a strictly legal matter or as a practical matter in light of the way the case is charged and tried. That is, it is not sufficient to avoid the double jeopardy bar that the second offense could theoretically be established without re-proving the first offense; if the government's theory of the case will require it to re-prove the first offense in order to establish the second, the second prosecution is barred. That interpretation of the

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*Gavieres* would come out the same way under *Grady*. *See* 495 U.S. at 523 & n.15. Even if *Gavieres* is inconsistent with *Grady*, it hardly supports petitioner's argument that *Grady* departs from past precedents, when *Gavieres's* exclusive reliance on *Blockburger* itself is inconsistent with numerous, more recent cases in which the Court has made clear that the *Blockburger* test, which looks only at the elements of the offenses as defined by the legislature, is not determinative of double jeopardy protections in successive prosecutions. *See, e.g.*, *Garrett v. United States*, 471 U.S. 773, 786 (1985).



> Court's language in *Grady*, we submit, is consistent with the facts that were before the Court in *Grady*, and it accommodates *Grady* to well-settled principles of double jeopardy law. . . .

Brief for Petitioner at 20, *United States v. Felix* (No. 90-1599).

Petitioner next asserts that the *Grady* formulation is confusing to the lower courts and therefore should be replaced with *Blockburger*, which is easier to apply and will work in most situations. Petitioner's reasoning is mistaken in several significant respects.

First, the lower courts are not in the state of confusion petitioner suggests over how to apply *Grady*.[24] Immediately after *Grady* there was disagreement in the lower courts over whether and how to apply *Grady* to more complicated offenses and how to reconcile *Grady* with *Dowling*.[25] *Felix* offered guidance on both of those

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[24] In fact, it was prior to *Grady* that the lower courts were confused, over whether *Blockburger* is the end of the inquiry in multiple prosecution cases. *See State v. Lonergan*, 566 A.2d at 683 (citing cases). *Grady* offered much needed guidance on that issue. With that fundamental issue resolved, in many cases the rest of the determination is easy. This case is a good example. Before *Grady* was decided, a major dispute in this case was whether *Blockburger* should be applied literally or with a more practical recognition of the offenses for which the defendants actually were being prosecuted. *See, e.g.*, Brief for Appellant at 24-36, *Foster v. United States*; Brief for Appellee at 21-35, *Foster v. United States*.

[25] *Compare, e.g., United States v. Gambino*, 920 F.2d 1108 (2d Cir. 1990), *vacated and remanded in light of Felix*, 112 S. Ct. 1657 (1992); *United States v. Calderone*, 917 F.2d 717 (2d Cir. 1990), *vacated and remanded in light of Felix*, 112 S. Ct. 1657 (1992); *with*

issues. 112 S. Ct. at 1382-83, 1383-85. *Felix* was decided only a few months ago, yet even in that time, it is apparent that the opinion went far toward clarifying the outstanding issues regarding *Grady*'s application. *Felix* reaffirmed *Grady*'s fundamental principle and the test articulated in *Grady* for application in a case that, like *Grady*, involved a "single course of conduct." 112 S. Ct. at 1385. In that context, *Grady*'s test is neither complex nor difficult to apply. It requires a court to examine both the elements of the offense and the government's theory of prosecution and determine whether, as the cases actually will be tried, the second offense necessarily will have been proven in the first prosecution, or vice versa. The lower courts are having no trouble applying *Grady* in cases involving a single course of conduct.[26] They also

*United States v. Pungitore*, 910 F.2d 1084 (3d Cir. 1990), *cert. denied*, 111 S. Ct. 2009 (1991); *United States v. Clark*, 928 F.2d 639 (4th Cir. 1991), *cert. denied*, 112 S. Ct. 1701 (1992); *and McIntyre v. Trickey*, 938 F.2d 899 (8th Cir. 1991), *vacated sub nom. Caspari v. McIntyre*, 112 S. Ct. 1658 (1992).

[26] *See, e.g., Dayton Women's Health Center v. Enix*, 589 N.E.2d 121 (Ohio Ct. App. 1991), *cert. denied*, 60 U.S.L.W. 3879 (1992) (conviction for criminal trespass bars prosecution for contempt); *State v. Mojarro*, 816 P.2d 260 (Ariz. 1991) (bar to successive prosecutions for contempt and hindering prosecution, based on same refusal to testify); *State v. Magazine*, 393 S.E.2d 385 (S.C. 1990) (contempt for violating protection order bars prosecution for assault and battery); *Jivers v. South Carolina*, 406 S.E.2d 154 (S.C. 1991) (bar to successive [illegible]ecution for criminal domestic violence and assault and batte[illegible] with intent to kill); *Harrelson v. Mississippi*, 569 So.2d 295 (Miss. 1990) (plea to driving on the wrong side of the highway barred subsequent prosecution for aggravated assault); *Illinois v. Hoskinson*, 559 N.E.2d 11 (Ill. App. 1990) (conviction for failure to obey a police officer barred two counts of aggravated battery based on knowing the



agree that *Grady* does not apply to CCE or RICO.[27] There is no reason for this Court now to abandon the principle and test it so recently affirmed, particularly in a case like this, limited "both as to time and to place," *Felix*, 112 S.Ct. at 1385, where *Grady*'s formulation has proven to be a very useful test.[28]

Petitioner's reasoning is also flawed because it proceeds from a false premise, that the "right" test for determining whether two offenses are the same in multiple prosecution cases must be simple to apply. In fact, as this Court has recognized at least since 1907, "[i]t may be difficult at times to determine whether the offense for which [a defendant] is being tried is, in every substantial

individual harmed to be a peace officer, but not three other counts, based on proof that the person battered is on a public way).

[27] *See, e.g., United States v. McHan*, No. 91-5187 (4th Cir. May 4, 1992); *United States v. Arnoldt*, 947 F.2d 1120 (4th Cir. 1991), *cert. denied*, 112 S. Ct. 1666 (1992); *United States v. Smith*, 963 F.2d 892 (6th Cir. 1992); *United States v. Evans*, 951 F.2d 729 (6th Cir. 1991), *cert. denied*, 112 S. Ct. 1966 (1992); *United States v. O'Connor*, 953 F.2d 338 (7th Cir.), *cert. denied*, 112 S. Ct. 1979 (1992); *United States v. Link*, 921 F.2d 1523 (11th Cir.), *cert. denied*, 111 S.Ct. 2273 (1991).

[28] For similar reasons, this Court does not need to address in this case petitioner's Travel Act hypothetical, Br. at 31-32, which involves an offense that is limited neither as to time or place. In any event, if the government proved a murder beyond a reasonable doubt in order to satisfy an essential element of 18 U.S.C. § 1952, *see* Federal Judicial Center, *Modern Federal Jury Instructions, Pattern Criminal Jury Instructions* FJC-87 (1991), it is not clear why it would be contrary to the letter or spirit of the Double Jeopardy Clause to bar a second prosecution for exactly the same murder.

respect, the same offense for which he had been previously tried." *Grafton v. United States*, 206 U.S. at 355. The Court in *Grafton* declined to "attempt to formulate any rule by which every conceivable case must be solved." *Ibid.* The Court in *Ashe v. Swenson*, 397 U.S. 436 (1970), voiced a similar recognition in concluding that no one easy test can be applied to determine whether, as a practical matter, a contested issue had been determined in favor of a defendant in a previous proceeding:

> The federal decisions have made clear that the rule of collateral estoppel in criminal cases is not to be applied with the hypertechnical and archaic approach of a 19th century pleading book, but with realism and rationality. . . . The inquiry "must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings."

*Ashe v. Swenson*, 397 U.S. at 444.[29]

Moreover, petitioner concedes that *Blockburger*, if strictly applied,[30] will not work in all cases. Pet. Br. 42-46.

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[29] The federal circuits unanimously have adopted this sort of practical inquiry in determining, based on the "totality of the circumstances," whether a defendant has been prosecuted twice for the same conspiracy. *See United States v. Ragins*, 840 F.2d at 1188-89.

[30] Petitioner discusses "strict adherence" to *Blockburger*, as if applying *Blockburger* "not strictly" were in any respect different from what the Court did in *Grady*. Determining whether, as a practical matter, in a particular case, the elements of two offenses are the same is no different from what the Court did in *Grady* and what the lower court did in this case. In other words, if *Harris* is just a "not strict" application of *Blockburger*, then so is *Grady* and so is this case.



That concession is fatal to petitioner's argument. Petitioner offers no principle for determining when *Blockburger* will be either under- or over-inclusive. That question, of course, is the heart of the matter. *Grady* provides a principled analysis of the reasons why *Blockburger* does not work in all cases. It also offers a test that is consistent with the double jeopardy interests at stake in a multiple prosecution case for determining when, although two offenses pass *Blockburger*'s legislative intent test, in practice a defendant is being prosecuted twice for the same offense.

Whether or not questions will arise regarding application of *Grady*'s test as cases percolate up through the lower courts, it is clearly premature for this Court to address them. It would be particularly inappropriate to try to address those questions in this case. Whatever difficulties there may be in applying *Grady* to situations beyond the "classically simple situation" in *Grady, Felix*, 112 S. Ct. at 1385, they are not present here. Under any test but the most strained application of *Blockburger*, the conclusion is inescapable that respondents in this case were prosecuted twice for the same offense.

## CONCLUSION

The judgments of the District of Columbia Court of Appeals should be affirmed.

Respectfully submitted,

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## APPENDIX

1. D.C. Code Ann. § 11-944 (1989 Repl.) provides:

> In addition to the powers conferred by section 402 of title 18, United States Code, the Superior Court, or a judge thereof, may punish for disobedience of an order or for contempt committed in the presence of the court.

2. D.C. Code Ann. § 16-1003(a) (1989 Repl.) provides:

> Upon referral by the United States attorney, or upon application of any person or agency for a civil protection order with respect to an intrafamily offense committed or threatened, the Corporation Counsel may file a petition for civil protection in the Family Division. In the alternative to referral to the Corporation Counsel, a complainant on his or her own initiative may file a petition for civil protection in the Family Division.

3. D.C. Code Ann. § 16-1005 (1989 Repl.) provides, in pertinent part:

> (c) If, after hearing, the Family Division finds that there is good cause to believe the respondent has committed or is threatening an intrafamily offense, it may issue a protection order –
>
> (1) directing the respondent to refrain from the conduct committed or threatened and to keep the peace toward the family members;
>
> * * *
>
> (f) Violation of any temporary or permanent order issued under this chapter . . . shall be punishable as contempt.

4. D.C. Code Ann. § 22-501 (1989 Repl.) provides:

> Every person convicted of any assault with intent to kill . . . shall be sentenced to imprisonment for not less than 2 years or more than 15 years.

5. D.C. Code Ann. § 22-504 (1989 Repl.) provides:

> Whoever unlawfully assaults, or threatens another in a menacing manner, shall be fined not more than $500 or be imprisoned not more than 12 months, or both.

6. D.C. Code Ann. § 22-2307 (1989 Repl.) provides:

> Whoever threatens within the District of Columbia to . . . injure the person of another . . . shall be fined not more than $5,000 or imprisoned not more than 20 years, or both.

7. D.C. Code Ann. § 23-1321(a) (1989 Repl.) provides, in pertinent part:

> Any person charged with an offense . . . shall, at his appearance before a judicial officer, be ordered released pending trial on his personal recognizance or upon the execution of an unsecured appearance bond . . . , unless the officer determines, in an exercise of his discretion, that such a release will not reasonably assure the appearance of the person as required or the safety of any other person or the community. When such a determination is made, the judicial officer shall, either in lieu of or in addition to the above methods of release, impose the first of the following conditions of release which will reasonably assure the appearance of the person for trial or the safety of any other person or the community, or, if no single condition



> gives that assurance, any combination of the following conditions:
>
> * * *
>
> (5) Impose any other condition . . . .
>
> * * *

8. D.C. Code Ann. § 23-1329 (1989 Repl.) provides, in pertinent part:

> (a) A person who has been conditionally released pursuant to section 23-1321 and who has violated a condition of release shall be subject to revocation of release, an order of detention, and prosecution for contempt of court.
>
> (b) Proceedings for revocation of release may be initiated on motion of the United States attorney. A warrant for the arrest of a person charged with violating a condition of release may be issued by a judicial officer and if such person is outside the District of Columbia he shall be brought before a judicial officer in the district where he is arrested and shall then be transferred to the District of Columbia for proceedings in accordance with this section. No order of revocation and detention shall be entered unless, after a hearing, the judicial officer finds that –
>
> (1) there is clear and convincing evidence that such person has violated a condition of his release; and
>
> (2) there is no condition or combination of conditions of release which will reasonably assure that such person will not flee or pose a danger to any other person or the community.

* * *

(c) Contempt sanctions may be imposed if, upon a hearing and in accordance with principles applicable to proceedings for criminal contempt, it is established that such person has intentionally violated a condition of his release. Such contempt proceedings shall be expedited and heard by the court without a jury. Any person found guilty of criminal contempt for violation of a condition of release shall be imprisoned for not more than six months, or fined not more than $1,000, or both.

* * *

9. D.C. Code Ann. § 33-501(15) (1988 Repl.) provides:

(15) "Narcotic drug" means any of the following substances, whether produced directly or indirectly by extraction from substances of vegetable origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis:

(A) Opium, its phenanthrene alkaloids, and their derivatives (except isoquiniline alkaloids of opium);

(B) Any salt, compound, isomer, derivative, or preparation thereof which is chemically equivalent or identical with any of the substances referred to in subparagraph (A) of this paragraph; or

(C) Opium poppy and poppy straw.

10. D.C. Code Ann. § 33-501(15) (1991 Supp.) provides, in pertinent part:

(15) "Narcotic drug" means . . . :



* * *

(D) Cocaine, it[s] salts, optical and geometric isomers, and salts of isomers;

* * *

11. D.C. Code Ann. § 33-541 (1988 Repl.) provides, in pertinent part:

(a)(1) Except as authorized by this chapter, it is unlawful for any person knowingly or intentionally to manufacture, distribute, or possess, with intent to manufacture or distribute, a controlled substance.

(2) Any person who violates this subsection with respect to:

(A) A controlled substance classified in Schedule I or II which is a narcotic drug, phencyclidine, or a phencyclidine immediate precursor, is guilty of a crime and upon conviction may be imprisoned for not more than 15 years, or fined not more than $100,000 or both.

(B) Any other controlled substance classified in Schedule I, II, or III, except for phencyclidine or a phencyclidine immediate precursor, is guilty of a crime and upon conviction may be imprisoned for not more than 5 years, fined not more than $50,000, or both.

12. D.C. Superior Court Rules Governing Intrafamily Proceedings provide, in pertinent part:

Rule 7. Motions.

(c) *Motion for contempt for violation of protection order.* When a motion for contempt is

filed alleging violation of a civil protection order or temporary protection order, the Intrafamily Clerk shall issue a notice of hearing and order directing appearance. * * * Punishment upon a finding of content shall be limited as provided in [Superior Court Rules] Intrafamily 12(e).

Rule 12. Contempt.

(b) *Violation of protection order.* A motion alleging one or more violations of a temporary protection order or civil protection order shall be filed and served pursuant to Rule 7(c).

(c) *Contempt hearing procedures.*

(1) The respondent has the right to counsel and shall be so advised.

(2) Anytime the judge contemplates imposing a sentence of imprisonment if the contempt is proven beyond a reasonable doubt, the judge may appoint counsel for the respondent. The Court may also request that the Corporation Counsel represent the petitioner.

* * *

(e) Punishment upon finding of contempt by the Division. Contempt may be punished by a fine or penalty of not more than $300.00 or by imprisonment for not more than six (6) months, or both.